

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Charles Cornfield, et al.,

Plaintiffs,

v.

John Pickens, et al.,

Defendants.

No. CV-16-00924-PHX-ROS

ORDER

Plaintiffs are five current or former employees of the Arizona State University Police Department attempting to assert numerous claims against two individuals and the Arizona Board of Regents (“ABOR”). The Court dismissed the previous complaint after concluding it provided insufficient guidance regarding the claims Plaintiffs were attempting to assert. The operative complaint suffers from similar flaws. This case will be dismissed without further leave to amend.

BACKGROUND

The following facts are taken from Plaintiffs’ Third Amended Complaint. (Doc. 24). Plaintiffs Charles Cornfield, Benjamin Robert Flynn, Bernard Linser, William J. O’Hayer, and Matthew V. Parker are either current or former officers with the ASU Police Department (“ASU PD”). According to the complaint, these individuals were harmed in a variety of ways during their employment. For some of the individuals, there is no connection between their claims and the claims asserted by the others. Because of this, it is simplest to recount the events and claims as they are grouped in the complaint

1 and then analyze each claim separately.

2 **A. William J. O'Hayer**

3 O'Hayer alleges on some unidentified date while working for the ASU PD he
4 "suffered an on-the-job injury that left his right arm disabled to the point where he could
5 no longer safely use a firearm." (Doc. 24 at 5). O'Hayer apparently was unable to work
6 for a time but returned to work in April 2014. His injury, however, "forced him to retire
7 from the ASU PD on June 20, 2014." During the two-month period O'Hayer worked
8 after his injury, "he was subject to discrimination based upon his disability." He was also
9 retaliated against "for having become disabled." This discrimination and retaliation
10 consisted of "[b]eing the target of unwarranted investigations," having his training
11 records "[i]llegally altered," being contacted at home "sometimes when he was sleeping,"
12 and "[b]eing ignored . . . by superiors." (Doc. 24 at 6). The complaint does not explain
13 what investigation O'Hayer is referencing, who altered his training records and how, why
14 it was inappropriate for him to be contacted at home, or when he was "ignored" by his
15 superiors. Moreover, the complaint does not allege O'Hayer was forced out of his job as
16 a result of his disability.

17 Based on his alleged mistreatment, O'Hayer alleges a single claim against the
18 ABOR for disability discrimination in violation of federal law. O'Hayer seeks
19 compensatory damages as well as injunctive relief. The request for injunctive relief is
20 strange, however, because O'Hayer alleges he is unable to work due to his disability.
21 Thus, it is unclear what form of injunctive relief he seeks.

22 **B. Charles Cornfield**

23 Cornfield worked for the ASU PD from 1995 until 2015. During his employment,
24 Cornfield believes the ASU PD and his superiors discriminated against him because of
25 his age. Cornfield's belief is based on three events: 1) he was "denied the use of a
26 Segway vehicle"; 2) he was told "he should be planning for retirement when he did not
27 plan any retirement"; and 3) he was not allowed to immediately return to work after he
28 had been off work due to medical leave. Cornfield does not allege who denied him use of

1 the Segway or when that happened, does not allege who told him to plan for retirement or
2 when that happened, nor does he allege who refused to permit him to return to work or
3 when that happened. Cornfield's age discrimination claim is brought under Arizona law
4 against the ABOR and he seeks only injunctive relief, apparently in the form of
5 reinstatement.

6 **C. Charles Cornfield, Benjamin Robert Flynn, and Bernard Linser**

7 In addition to his age discrimination claim, Cornfield asserts a free speech claim.
8 This claim is also asserted by other ASU officers Benjamin Robert Flynn and Bernard
9 Linser. The complaint alleges from 2014 through 2015, there was a blog "popular among
10 the ASU community." That blog included comments from "anonymous bloggers about
11 public safety on the ASU campus" and the ASU PD. Those comments were often critical
12 of the ASU PD. The chief at that time was Michael Thompson who believed some of the
13 comments must have been made by ASU PD officers. Thompson arranged for the
14 Arizona Department of Public Safety to investigate and determine who had contributed to
15 the blog. Investigators questioned Cornfield, Flynn, and Linser during this investigation.
16 The complaint describes the questioning as "unwarranted" and alleges Cornfield, Flynn,
17 and Linser "suffered emotional distress and worry about their jobs" because of the
18 questioning. The questioning also "had a chilling effect" which discouraged them "from
19 future protected speech on matters of public concern."

20 Based solely on the questioning, Cornfield, Flynn, and Linser allege a claim for
21 violation of their free speech rights under 42 U.S.C. § 1983. The claim is described as
22 "[r]etaliation for perceived exercise of free speech" and brought solely against
23 Thompson, seeking unspecified "[p]rospective injunctive relief" and "[d]eclaratory
24 relief."

25 **D. Matthew V. Parker**

26 Parker worked for the ASU PD from August 2008 until January 2014. During that
27 time Parker held a prominent position in a police union. In that position, "Parker often
28 clashed with the Chief and other high ranking officers of the ASU PD." In addition, "the

1 Chief” and others “openly showed hostility to Parker” because of his union involvement.
2 The complaint contains no further factual elaboration regarding these clashes or
3 “hostility” and the references to “the Chief” are not references to Defendant Thompson
4 but to a prior chief of police.

5 Parker voluntarily left the ASU PD in 2014 and was hired by the Arizona Attorney
6 General’s office. During the hiring process, Parker disclosed he had been the subject of
7 four internal investigations while at the ASU PD. Later, an investigator for the Attorney
8 General’s office contacted the ASU PD “to find out exactly what internal investigation[s]
9 had been done at the ASU PD on Parker.” Defendant Louis Scichilone, the ASU PD
10 employee in charge of records, told the investigator that Parker had been the subject of
11 six internal investigations. Nothing happened as a result of the Attorney General’s office
12 learning that information and Parker continued working for the Attorney General’s office.

13 A short while later, Parker was injured and had to leave his job. After leaving, the
14 Attorney General’s office “reported to AZPOST¹ that [Parker] was not eligible for rehire
15 because he had misrepresented . . . [the] number of internal investigations while
16 employed at ASU PD.” (Doc. 24 at 11). Based on that, AZPOST “commence[d]
17 decertification of Parker.” If decertification occurs, Parker will not be able to work as a
18 peace officer.

19 Parker asserts a claim under § 1983 for “[r]etaliatio[n] for perceived exercise of free
20 speech and freedom of association.” The basis for this claim is not entirely clear but
21 Parker appears to believe the ASU PD misrepresented to the Attorney General’s office
22 the number of internal investigations against him in retaliation for his work with the
23 police union. This claim is asserted against Scichilone and Thompson but seeks only
24 injunctive and declaratory relief. As with many other claims, it is unclear what relief
25 Parker is actually seeking because neither Scichilone nor Thompson have any ongoing
26 contact with Parker and there is no indication how Parker would be entitled to

27
28 ¹ The complaint does not explain what AZPOST is but, according to its website,
any peace officer wishing to work in Arizona must be certified by AZPOST.

1 reinstatement given that he voluntarily left the ASU PD.

2 In addition to his § 1983 claim, Parker also asserts a state-law claim labeled as
 3 “Violation of Arizona Public Records Act.” This claim is based on Parker’s recent
 4 unsuccessful attempts “to inspect his personnel files and in particular all records of all
 5 internal investigations by the ASU PD.” The refusal to allow him complete access to
 6 these records allegedly violates a state statute known as the Arizona Public Records Act.
 7 This claim is brought against the ABOR and seeks the production of records and statutory
 8 damages.

9 ANALYSIS

10 I. Standard for Motion to Dismiss

11 “To survive a motion to dismiss, a complaint must contain sufficient factual
 12 matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v.*
 13 *Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted). A claim is plausible “when the
 14 plaintiff pleads factual content that allows the court to draw the reasonable inference that
 15 the defendant is liable for the misconduct alleged.” *Id.* This does not require “detailed
 16 factual allegations,” but it does require “more than an unadorned, the-defendant-
 17 unlawfully-harmed-me accusation.” *Id.* This is not a “probability requirement,” but a
 18 requirement that the factual allegations show “more than a sheer possibility that a
 19 defendant has acted unlawfully.” *Id.*

20 II. O’Hayer’s Disability Discrimination Claim

21 O’Hayer alleges a single claim for disability discrimination under the
 22 Rehabilitation Act, 29 U.S.C. § 794. O’Hayer did not assert this claim until the Third
 23 Amended Complaint. Rehabilitation Act claims are subject to a two-year statute of
 24 limitations. *Oskowis v. Sedona Oak-Creek Unified Sch. Dist. #9*, No. CV-16-08063-
 25 PCT-JJT, 2017 WL 1135558, at *3 (D. Ariz. Mar. 27, 2017) (Rehabilitation Act claims
 26 subject to Arizona’s two-year limitations period). O’Hayer alleges he retired on June 20,
 27 2014. Thus, his claim accrued no later than that date. O’Hayer filed his original
 28 complaint on February 17, 2016, his Amended Complaint on February 26, 2016, his

1 Second Amended Complaint on April 25, 2016, and his Third Amended Complaint on
2 August 25, 2016. Based on these dates, if his claim relates back to any of his first three
3 complaints, it is timely. If, however, the claim does not relate back, it must be dismissed
4 as untimely.

5 A claim asserted in an amended pleading relates back to an earlier pleading if the
6 new claim “arose out of the conduct, transaction, or occurrence set out . . . in the original
7 pleading.” Fed. R. Civ. P. 15(c)(1)(B). As interpreted by the Ninth Circuit, a new claim
8 meets this test “if it will likely be proved by the same kind of evidence offered in support
9 of the original pleading.” *ASARCO, LLC v. Union Pac. R. Co.*, 765 F.3d 999, 1004 (9th
10 Cir. 2014) (quotation marks and citation omitted). More importantly, the new claim must
11 “share a common core of operative facts” with the previously-asserted claims such “that
12 the adverse party has fair notice of the transaction, occurrence, or conduct called into
13 question.” *Id.*

14 O’Hayer’s Rehabilitation Act claim in the Third Amended Complaint does not
15 relate back to an earlier pleading because no earlier pleading indicated O’Hayer was
16 attempting to assert a disability-related claim. There does not appear to have been any
17 reference to disability-related issues in the Original Complaint or Amended Complaint.
18 It was only in the Second Amended Complaint that O’Hayer made even an oblique
19 reference to a disability issue. In that complaint, O’Hayer provided lengthy allegations
20 about various forms of mistreatment he suffered, almost all of which had no possible
21 connection to an alleged disability. The mistreatment identified in the Second Amended
22 Complaint included O’Hayer having his answers on written exams marked incorrect
23 despite being correct, suffering some unidentified form of harassment in connection with
24 new radio equipment, being told to make false traffic stops, and being directed to alter
25 written reports. These instances of mistreatment are not linked to O’Hayer’s alleged
26 disability. Instead, the *only* reference to disability issues in the Second Amended
27 Complaint was a one-half sentence alleging O’Hayer had been “out on leave for
28 disability issues [and then] required to return to work [and] denied light duty work.”

(Doc. 10 at 16). The portion of the Second Amended Complaint listing the claims did not allege a Rehabilitation Act or other disability-related claim nor did it include any additional reference to disability-related issues. In sum, no reasonable reader of the Second Amended Complaint would have known O'Hayer was attempting to assert a Rehabilitation Act claim. *See ASARCO*, 765 F.3d at 1006 (relation back requires earlier party be sufficient to notify party "of litigation concerning a particular transaction or occurrence").

Without some reasonable indication in the prior complaints that O'Hayer was attempting to assert a disability-related claim, his new claim in the current complaint does not relate back. And because the operative complaint was filed outside the two-year statute of limitations, O'Hayer's Rehabilitation Act claim must be dismissed as untimely.

III. Cornfield's Age Discrimination Claim

Cornfield's age discrimination claim is asserted exclusively under Arizona law. The Court has supplemental jurisdiction over this claim only to the extent it is "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). Cornfield's age discrimination claim, however, has no connection to any of the claims where original jurisdiction exists. In other words, Cornfield's age discrimination claim does not share "a common nucleus of operative fact" with any of the events underlying the federal claims. *Bahrapour v. Lampert*, 356 F.3d 969, 978 (9th Cir. 2004) (quotation marks and citation omitted).

According to Cornfield, he was discriminated against when he was denied use of a Segway, was asked about retirement, and was not allowed to return to work after being cleared by his physician. The complaint does not draw any connection between these events and the events involving alleged violation of his free speech rights or any of the other federal claims. Therefore, Cornfield's age discrimination claim cannot proceed in federal court.

IV. Cornfield, Linser, and Flynn's Retaliation Claim

1 As alleged in the Third Amended Complaint, Cornfield, Linser, and Flynn believe
2 they were retaliated against when they were questioned in connection with the
3 investigation into the critical comments posted on the ASU PD blog. To state a plausible
4 retaliation claim, the complaint must allege facts establishing, among other things, that
5 Cornfield and the others suffered an “adverse employment action.” *Coszalter v. City of*
6 *Salem*, 320 F.3d 968, 973 (9th Cir. 2003). There is no adverse employment action
7 alleged in the complaint.

8 In the First Amendment retaliation context, an actionable adverse employment
9 action “need not be severe and it need not be of a certain kind.” *Dahlia v. Rodriguez*, 735
10 F.3d 1060, 1078 (9th Cir. 2013). When determining if a particular action constituted an
11 adverse employment action, “the proper inquiry is whether the action [was] reasonably
12 likely to deter employees from engaging in protected activity.” *Id.* (quotation marks and
13 citation omitted). And “[d]epending on the circumstances, even minor acts of retaliation
14 can infringe on an employee’s First Amendment rights.” *Id.* at 1079 (quotation marks
15 and citation omitted).

16 Viewing the complaint in the light most favorable to Cornfield, Linser, and Flynn,
17 the only adverse employment action possibly at issue is that they “had to endure
18 unwarranted internal investigations.” (Doc. 24 at 8). The complaint alleges those
19 “investigations” happened after Thompson became concerned that some of the comments
20 on the blog “were ‘inside information.’” (Doc. 24 at 8). The “investigations” consisted
21 of Cornfield, Linser, and Flynn being questioned about their possible involvement in the
22 blog. Cornfield, Linser, and Flynn believe that questioning—standing alone—can
23 support a retaliation claim. It cannot.

24 Cornfield, Linser, and Flynn do not cite any authority that being questioned in an
25 internal investigation, without any other potentially adverse actions against them, is
26 sufficient to support a retaliation claim. Unlike cases involving plausible retaliation
27 claims, the complaint does not allege Cornfield and the others were threatened or
28 excluded from certain activities. *See Coszalter v. City of Salem*, 320 F.3d 968, 975 (9th

1 Cir. 2003) (threats and exclusion from activities can qualify as adverse actions). Nor
2 does the complaint allege Cornfield and the others were prevented from pursuing
3 promotional opportunities, forfeited pay, placed on administrative leave, or even suffered
4 some form of “general stigma” from being questioned during the investigation. *Dahlia*,
5 735 F.3d 1060 at 1079. While the threshold for a viable retaliation claim is low, it is not
6 so low such that merely being questioned in connection with an internal investigation can
7 support a claim. As noted by the Ninth Circuit, sometimes “the would-be retaliatory
8 action is so insignificant that it” cannot support a retaliation claim. *Coszalter*, 320 F.3d at
9 975. That is the situation here. The retaliation claim must be dismissed.

10 **V. Parker’s Retaliation Claim**

11 Parker also asserts a retaliation claim but his claim is not based on the internal
12 investigation. Instead, Parker alleges he was retaliated against because of his speech and
13 association with the police union. The causal chain Parker alleges is convoluted and the
14 factual allegations supporting his claim are very sparse.² The claim appears to be based
15 on interactions Parker had with Scichilone during Parker’s tenure with the ASU PD.
16 Parker does not allege when those disputes occurred but the disputes allegedly led
17 Scichilone to misrepresent Parker’s history of internal investigations to the investigator
18 with the Attorney General’s office long after Parker left the ASU PD. That
19 misrepresentation did not injure Parker immediately but only after he left the Attorney
20 General’s office and that office reported to yet another entity that Parker was not eligible
21 for rehire. The complaint does not contain sufficient factual allegations to make it
22 plausible that Parker’s speech, perhaps years before he left the ASU PD, was the
23 motivating factor for Scichilone’s purported misrepresentation.

24 Parker has not pled sufficient facts establishing when he engaged in protected
25 speech or that he suffered a cognizable adverse action as a result of that speech. But even
26 assuming he had, Parker’s retaliation claim would be viable only if he had alleged facts

27
28 ² Parker alleges this claim against Thompson and Scichilone. However, Parker does not make any allegations linking Thompson to any of the purported retaliatory conduct. Therefore, Parker has not stated a plausible claim against Thompson.

1 showing his “speech was a substantial motivating factor for the adverse action.”³ *Cain v.*
 2 *Tigard-Tualatin Sch. Dist.* 23J, 262 F. Supp. 2d 1120, 1125 (D. Or. 2003). The
 3 complaint, however, does not allege any facts providing a plausible link between
 4 Scichilone’s statement to the Attorney General’s investigator and Parker’s involvement
 5 with the union. The complaint alleges Scichilone had “expressed his hostility” about the
 6 union but there is no indication when that occurred or what Scichilone said. Absent some
 7 additional facts showing the hostility remained at the time Parker left, it is not plausible
 8 to attribute Scichilone’s alleged misrepresentation to a desire to retaliate against Parker
 9 for his union-related speech. Parker has pled a legal conclusion that Scichilone intended
 10 to retaliate against him but he has not alleged facts supporting that conclusion. Parker’s
 11 retaliation claim must be dismissed.

12 **VI. Parker’s Public Records Claim**

13 Parker asserts a claim under the Arizona Public Records Act. To the extent Parker
 14 is seeking monetary damages on this claim, his failure to comply with Arizona’s notice of
 15 claim statute is fatal. Alternatively, if Parker is attempting to obtain injunctive relief, he
 16 cannot pursue his claim here.

17 Pursuant to Arizona statute, any person who has been denied access to public
 18 records “may appeal the denial through a special action in the superior court, pursuant to
 19 the rules of procedure for special actions against the officer or public body.” A.R.S. §
 20 39-121.02. The Ninth Circuit has held “[a] litigant cannot use supplemental jurisdiction
 21 to have a federal judge instead of a state judge perform the judicial review of a state
 22 administrative agency decision which the state statute assigns to a state court.” *Mischia*
 23 *v. Pirie*, 60 F.3d 626, 631 (9th Cir. 1995). Based on that, Parker is not entitled to have a
 24 federal court review the ASU PD’s alleged failure to provide the records Parker seeks.⁴

25
 26 ³ Retaliation claims usually arise in the context of public employment but the
 27 requirement of an adverse action exists even when no employment relationship exists.
 28 *Cain v. Tigard-Tualatin Sch. Dist.* 23J, 262 F. Supp. 2d 1120, 1125 (D. Or. 2003)
 (nothing same elements are present in employment and non-employment context for First
 Amendment retaliation claims).

⁴ The Court also lacks supplemental jurisdiction over this claim. Parker’s

VII. Leave to Amend

There have been four complaints filed in this case. While only two of those complaints have been the subject of motions to dismiss, the most recent complaint did not come meaningfully closer to stating plausible claims than the previous complaints. And the present complaint still contained claims that were very far from plausible. In dismissing the previous complaint, the Court provided substantial guidance regarding what would be necessary for any claims to proceed. Plaintiffs' recent complaint did not follow that guidance. It now appears Plaintiffs are not able to state plausible claims. Therefore, it would be futile to grant further leave to amend.

VIII. Sanctions Will Be Imposed

Defendants seek sanctions against Cornfield, Flynn, Linser, O'Hayer, and Parker ("Plaintiffs") as well as David Dow, Plaintiffs' previous counsel. Sanctions are sought against Plaintiffs and Dow under Federal Rule of Civil Procedure 11 and against Dow under 28 U.S.C. § 1927. The sequence of events leading up to Defendants' filing the sanctions motion is complicated but must be addressed in some detail.

A. Factual Background of Sanctions Motion

In February 2016, Dow filed Plaintiffs' original complaint in state court. (Doc. 1-1 at 2). While still in state court, Dow filed an Amended Complaint. The Amended Complaint was removed to federal court and, after removal, Defendants sent Dow a letter explaining none of the claims in the Amended Complaint were plausible. Defendants informed Dow they would seek sanctions if the claims were not withdrawn. After Defendants and Dow discussed the flaws in the Amended Complaint, Dow stated he would amend the complaint again to address Defendants' concerns. Dow then filed the

retaliation claim is based on Scichilone's alleged statement in 2014 to the investigator from the Attorney General's office. Parker's access to public records claim is based on recent attempts by Parker to review his personnel file. These two claims do not arise out of a common nucleus of operative fact. And Parker's public records claim has no relationship to any other claim in the complaint. Finally, even assuming supplemental jurisdiction did exist, there are no longer any federal claims pending such that an exercise of supplemental jurisdiction would not be appropriate. *See Gini v. Las Vegas Metro. Police Dep't*, 40 F.3d 1041, 1046 (9th Cir. 1994) (court should dismiss state-law claim when federal claims are dismissed before trial).

1 Second Amended Complaint which did not address the flaws previously pointed out to
2 him. (Doc. 10).

3 On May 31, 2016, Defendants moved to dismiss the Second Amended Complaint.
4 Dow filed an opposition but that opposition did not meaningfully engage with the
5 arguments in the motion to dismiss. After reviewing the opposition, Defendants served
6 Dow with a motion for sanctions on July 5, 2016. Because sanctions were sought under
7 Rule 11, there was a 21-day safe harbor before Defendants could file their motion. And
8 before that safe harbor period expired, the Court granted the motion to dismiss, finding
9 the Second Amended Complaint did not state any plausible claims. Dow was granted
10 leave to amend but was warned he needed to file a substantially improved complaint to
11 have any chance of proceeding.

12 On August 25, 2016, Dow filed the Third Amended Complaint. On October 13,
13 2016, Dow was allowed to withdraw and on October 14, 2016, Defendants filed a motion
14 to dismiss. Finally, on October 28, 2016—approximately two weeks after filing their
15 motion to dismiss—Defendants served another sanctions motion on Dow and Plaintiffs.
16 That motion argued the Third Amended Complaint violated Rule 11 because it contained
17 “frivolous and unfounded claims.” (Doc. 39 at 2). The motion sought Rule 11 sanctions
18 as well as sanctions under § 1927. (Doc. 39 at 2). Neither Dow nor Plaintiffs took any
19 action after receiving the sanctions motion. Accordingly, after the safe harbor period
20 elapsed, Defendants filed the motion for sanctions. (Doc. 39).

21 Dow and Plaintiffs filed separate responses to the motion for sanctions.
22 According to Dow, he cannot be sanctioned under Rule 11 because he withdrew as
23 counsel before the motion for sanctions was served. That is, Dow claims he did not have
24 the power to withdraw the Third Amended Complaint and, therefore, Rule 11 cannot
25 reach his actions. In addition, Dow claims he did not engage in any conduct that would
26 subject him to sanctions under Rule 11 or § 1927. As for Plaintiffs, they oppose
27 sanctions under Rule 11 by arguing the request was filed prematurely because the Third
28 Amended Complaint had not yet been dismissed when the motion was filed. Plaintiffs

1 also claim any sanctions should be against Dow because it would be inappropriate to
 2 sanction them given that the deficiencies in the Third Amended Complaint were the
 3 product of “Dow’s neglect and incompetence.” (Doc. 42 at 9).

4 **B. Standard for Rule 11 Sanctions**

5 An attorney or a party can be subject to Rule 11 sanctions when he signs, files or
 6 advocates for “a pleading, written motion, or other paper” that contains factual
 7 contentions without factual support or “when he presents to the court claims, defenses,
 8 and other legal contentions . . . [not] warranted by existing law or by a nonfrivolous
 9 argument for the extension, modification, or reversal of existing law or the establishment
 10 of new law.” *Holgate v. Baldwin*, 425 F.3d 671, 675-76 (9th Cir. 2005). Defendants’
 11 request for Rule 11 sanctions focuses on factually baseless assertions in the Third
 12 Amended Complaint. The Court will limit its analysis under Rule 11 to the factual
 13 assertions.

14 Plaintiffs did not sign or file the Third Amended Complaint but they later
 15 advocated for it by opposing the motion to dismiss. *See Buster v. Greisen*, 104 F.3d
 16 1186, 1190 n.4 (9th Cir. 1997) (noting Rule 11 allows for sanctions based on filing as
 17 well as “later advocating” a document). Thus, they may be sanctioned if the complaint
 18 violated Rule 11.

19 Dow signed and filed the complaint prior to withdrawing. Dow now argues his
 20 withdrawal prevents him from being sanctioned under Rule 11. That is incorrect. While
 21 Dow may not have represented Plaintiffs at the end of the safe-harbor period, he was not
 22 powerless to avoid Rule 11 sanctions. If Dow believed the pleading he drafted, signed,
 23 and filed should be withdrawn because it lacked factual or legal support, he should have
 24 sought guidance from the Court regarding the appropriate path to pursue. Dow was not,
 25 however, entitled to draft, sign, and file a potentially sanctionable filing and then avoid
 26 all responsibility by withdrawing. Therefore, Dow can also be held liable under Rule 11.

27 For Plaintiffs or Dow to be sanctioned under Rule 11 based on the Third Amended
 28 Complaint, the Court “must conduct a two-prong inquiry.” *Holgate*, 425 F.3d at 676.

1 First, the complaint must have been “legally or factually baseless from an objective
 2 perspective.” *Id.* And second, the Court must determine if the attorney or party
 3 “conducted a reasonable and competent inquiry before signing and filing it [or advocating
 4 it].” *Id.* The motion for sanctions identifies the following factual statements as baseless.

- 5 • Plaintiff Cornfield and Linser alleged they “had to endure unwarranted internal
 6 investigations which they reasonably believed might have been criminal
 7 investigations.”
- 8 • Cornfield alleged he had been constructively discharged on July 2, 2015, because
 9 of “hostility at the ASU PD based upon his age.” (Doc. 24 at 7).
- 10 • Parker alleged Scichilone falsely reported to the Attorney General’s Office that he
 11 had been subject to six internal investigations when, in fact, he had only been
 12 subject to four.
- 13 • Parker’s allegations reference “the Chief” when describing his disagreements with
 14 the ASU PD regarding union activities. Parker does not clarify, however, that “the
 15 Chief” being referenced is a different individual than the current Chief.

16 All four of these statements were, in fact, factually baseless.

17 First, prior to their interviews in connection with the internal investigation,
 18 Cornfield and Linser signed documents indicating they were being interviewed in
 19 connection with an “administrative investigation,” not a criminal investigation, and there
 20 were “no allegations of misconduct” against them at that time. (Doc. 39-1 at 50). The
 21 documents further indicated Cornfield and Linser were not the focus of the investigation
 22 but were being interviewed as witnesses or potential witnesses only. (Doc. 39-1 at 50).
 23 From an objective perspective, the complaint’s allegation that the investigations “might
 24 have been criminal investigations” was factually baseless.

25 Second, Cornfield’s allegation that he was constructively discharged on July 2,
 26 2015, is contradicted by an email Cornfield sent on February 13, 2015 stating “It is my
 27 intention to retire from Arizona State University effective July 2, 2015. Please let me
 28 know what paperwork and/or steps are necessary to facilitate this.” (Doc. 39-1 at 47).
 From an objective perspective, Cornfield’s claim that he was constructively discharged in

1 July after sending that email in February was factually baseless.

2 Third, Parker's allegation that he had been subject to only four investigations is
3 contradicted by an internal document showing Parker was subject to six internal
4 investigations. That document was produced to Parker long before he made the
5 allegation. From an objective perspective, therefore, the allegation regarding the number
6 of investigations was factually baseless.

7 And fourth, Parker knew "the Chief" relevant to his disagreements with the ASU
8 PD over union activities was a different individual from the current Chief. At the time he
9 advocated for the Third Amended Complaint, Parker knew the current Chief took office
10 after Parker left the ASU PD. By failing to distinguish between the two chiefs, Parker
11 attempted to allege a factual basis for the current Chief having a reason to retaliate
12 against Parker for his previous union activities.

13 The four statements were factually baseless and the Court must determine if
14 Plaintiffs or Dow made a reasonable inquiry before asserting these statements. They did
15 not. In fact, the statements must have been knowingly false. First, having signed
16 documents indicating the interviews were not a criminal matter, Cornfield and Linser
17 could not have believed otherwise. Second, Cornfield must have known of the email he
18 sent regarding his planned retirement. Third, Parker must have known about the actual
19 number of internal investigations he had been involved in while at the ASU PD. And
20 fourth, Parker must have known the chief of police had changed. While Cornfield,
21 Linser, and Parker are now proceeding pro se, that does not excuse their behavior. *See*
22 *Warren v. Guelker*, 29 F.3d 1386, 1390 (9th Cir. 1994) ("Rule 11 applies to pro se
23 plaintiffs, the court must take into account a plaintiff's pro se status when it determines
24 whether the filing was reasonable."). Pro se plaintiffs are not free to knowingly
25 misrepresent basic facts regarding their claims. Therefore, Cornfield, Linser, and Parker
26 violated Rule 11 by making baseless factual allegations.

27 The same analysis, however, does not apply to Flynn and O'Hayer. Flynn and
28 O'Hayer likely should have conducted an inquiry to ensure the factual allegations

1 regarding the other named plaintiffs were accurate. But Flynn and O'Hayer's pro se
 2 status supports the Court overlooking their failure to do so. *Id.* In addition, there are no
 3 factual allegations involving Flynn and O'Hayer that satisfy the two-step test under Rule
 4 11. Accordingly, Flynn and O'Hayer cannot be sanctioned under Rule 11.

5 As for Dow, he claims to have "reviewed and re-reviewed thousands of pages of
 6 documents and recordings prior to filing the Complaint in this case and re-reviewed the
 7 evidence prior to drafting a proposed [Third Amended Complaint]." (Doc. 44). Dow
 8 does not explain, however, what documents he is referencing nor does he explain how the
 9 documents established the good-faith basis for the particular factual allegations identified
 10 above. Instead of offering a reasonable explanation for those allegations, Dow's
 11 opposition to the motion for sanctions cites to irrelevant matters such as defense
 12 counsel's involvement in unrelated litigation. (Doc. 44 at 2). Dow also claims he has
 13 never been sanctioned before. But Dow offers no explanation how a lack of prior
 14 sanctions is responsive to the particular issues presented in the motion for sanctions.
 15 With no evidence establishing a basis for Dow's factual allegations outlined above, the
 16 only conclusion is that he did not conduct a reasonable inquiry prior to filing the Third
 17 Amended Complaint.

18 In sum, the four factual allegations were objectively false and could not have been
 19 the product of a reasonable inquiry by Cornfield, Linser, Parker, or Dow. Therefore,
 20 these allegations are sanctionable under Rule 11.

21 **D. Sanctions Under § 1927 Against Dow**

22 In addition to Rule 11, Defendants also seek sanctions against Dow pursuant to 28
 23 U.S.C. § 1927. That statute provides any attorney "who so multiplies the proceedings in
 24 any case unreasonably and vexatiously may be required by the court to satisfy personally
 25 the excess costs, expenses, and attorneys' fees reasonably incurred because of such
 26 conduct." 28 U.S.C. § 1927. To impose sanctions under this statute, the Court must
 27 make a finding of "subjective bad faith." *In re Keegan Mgmt. Co., Sec. Litig.*, 78 F.3d
 28 431, 436 (9th Cir. 1996). "Bad faith is present when an attorney knowingly or recklessly

1 raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an
2 opponent.” *Id.*

3 In filing the complaints and other documents in this case, Dow engaged in a wide
4 variety of inappropriate conduct. As noted in the order granting the earlier motion to
5 dismiss, the Second Amended Complaint contained voluminous factual allegations that
6 had no connection to any plausible legal claims. For example, the Second Amended
7 Complaint included allegations about a bicycle crash that occurred in 2002. That crash
8 was completely irrelevant to the claims at issue. Overall, the Second Amended
9 Complaint consisted of disconnected allegations where eight plaintiffs were trying to sue
10 twelve defendants on five separate claims with no way a diligent reader could discover,
11 precisely, who was alleged to have harmed each plaintiff or how. The Second Amended
12 Complaint did not present claims with even a remotely plausible chance of proceeding.

13 Beyond the factual deficiencies in the Second Amended Complaint, it asserted
14 frivolous claims and legal theories given the undisputed underlying facts. The frivolous
15 claims and theories included, but were not limited to, the following. First, Dow asserted
16 numerous state-law claims for money damages but he conceded no notice of claim was
17 filed prior to asserting those claims. That failure barred the state-law claims and Dow
18 made no non-frivolous argument that the state-law claims could proceed. Second, Dow
19 asserted claims pursuant to 42 U.S.C. § 1983 against the Arizona Board of Regents
20 (“ABOR”). As explained in the Court’s Order, arms of a state are not subject to suit
21 under § 1983 and Dow offered no non-frivolous argument in support of asserting a
22 § 1983 claim against ABOR. Third, Dow attempted to assert a § 1983 claim against
23 ABOR based on a municipality liability theory. According to Dow, “in most cases,
24 claims against police officers are litigated under *Monell v. New York City Dept. of Social*
25 *Serv.* [by bringing suit] against the responsible entity; usually a city or county.”⁵ That is

26
27 ⁵ That is inaccurate and represents a failure to research and understand applicable
28 law. Most § 1983 claims against police officers are asserted against the officers in their
individual capacity and only when a plaintiff believes a policy or practice of the relevant
entity caused a deprivation of constitutional rights is a claim under *Monell* appropriate.

1 incorrect but, even assuming ABOR could be subject to a *Monell* claim, Dow never
2 asserted a plausible factual or legal basis for arguing the facts in this case implicated an
3 unconstitutional policy or practice. Fourth, Dow asserted a conspiracy claim under §
4 1985 without explaining the class-based considerations at issue. And fifth, Dow
5 presented a number of arguments in his opposition to the motion to dismiss that had
6 nothing to do with the claims alleged in the complaint. For example, Dow argued
7 Defendants had violated the Family Medical Leave Act, the Occupational Safety and
8 Health Act (“OSHA”), and interfered with the right to unionize. While the complaint had
9 mentioned these issues, there was no indication Dow was actually attempting to pursue
10 such claims. Moreover, it is well-established that under at least one of the statutes cited,
11 no private right of action exists. *See Clark v. Wells Fargo Bank*, 669 F. App’x 362, 363
12 (9th Cir. 2016) (“The district court properly dismissed [the plaintiff’s] allegations of
13 OSHA violations because OSHA does not provide a private right of action.”). Thus,
14 Dow’s arguments regarding irrelevant statutes were an attempt to confuse the issues.

15 Dow’s conduct in asserting all of these baseless claims and theories is striking
16 because Defendants informed him of the flaws prior to moving to dismiss the Amended
17 Complaint. Defense counsel sent Dow a twelve-page letter and draft motion to dismiss
18 which outlined in detail the flaws in the Amended Complaint. Dow responded that he
19 planned to amend again to cure the deficiencies. (Doc. 39-1 at 24). Dow then filed the
20 Second Amended Complaint without addressing any of Defendants’ points. In fact, the
21 Second Amended Complaint made very few changes, none of which materially impacted
22 the viability of Dow’s claims and arguments. In light of defense counsel’s lengthy
23 explanation of the legal flaws in the Amended Complaint, Dow’s decision to continue to
24 pursue baseless factual and legal theories establishes he was knowingly or recklessly
25 pursuing frivolous claims and theories. Dow’s actions constituted bad faith attempts to
26 unreasonably and vexatiously prolong this litigation.⁶

27
28 ⁶ Dow’s filings were frivolous. Therefore, recklessness suffices. *In re Keegan Mgmt. Co., Sec. Litig.*, 78 F.3d 431, 436 (9th Cir. 1996) (“For sanctions to apply, if a filing is submitted recklessly, it must be frivolous, while if it is not frivolous, it must be

1 **E. Amount of Sanctions**

2 Cornfield, Linser, Parker, and Dow violated Rule 11 and Dow violated § 1927.
3 The only remaining issue is the appropriate amount of sanctions to assess against each
4 individual.

5 Pursuant to Rule 11(c)(4), any sanction imposed must be limited to what suffices
6 to deter repetition of the conduct or comparable conduct by others similarly situated.”
7 This allows for “nonmonetary directives,” payment of “a penalty into court,” or an award
8 of “part or all of the reasonable attorney’s fees and other expenses directly resulting from
9 the violation.” Section 1927 is slightly more limited, allowing only for an award of “the
10 excess costs, expenses, and attorneys’ fees incurred” as a result of the sanctionable
11 conduct. *See Prosser v. Prosser*, 186 F.3d 403, 407 (3d Cir. 1999) (“[S]ection 1927 only
12 allows the court to award costs and attorney fees payable to the opposing party, not
13 payable to the court.”). Under both Rule 11 and § 1927, Defendants request the Court
14 award “the substantial attorneys’ fees [they] have incurred in defending this action.”
15 (Doc. 39 at 18). This appears to be a request for all the fees Defendants incurred in
16 defending this suit.

17 As recently noted by the Supreme Court, an award of attorneys’ fees under Rule
18 11 or § 1927 must be based on a causal link between the misconduct and the amounts
19 awarded. *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 n.5 (2017).
20 Defendants’ motion does not address this causation requirement. In particular,
21 Defendants do not offer the exact amounts incurred as a result of discrete instances of
22 misconduct. Absent such evidence, the Court cannot award Defendants the fees they
23 seek. Moreover, awarding Defendants a substantial amount of fees might be more than
24 necessary to deter future similar conduct by Cornfield, Linser, and Parker. *See Fed. R.*
25 *Civ. P. 11(c)(4)* (sanction “must be limited to what suffices to deter repetition of the
26 intended to harass.”).

1 conduct”).

2 Based on the need for a causal link between the sanctionable conduct and the fees
3 awarded, the parties will be directed to meet and confer and determine if an agreement
4 can be reached regarding the appropriate amount of sanctions to impose. In conferring,
5 the parties should keep in mind that the sanctions against Cornfield, Linser, and Parker
6 should be more limited than the sanctions against Dow. In fact, the sanctions against
7 Cornfield, Linser, and Parker need not be substantial as the goal is deterrence, not
8 punishment. During their conferral, Defendants must provide Cornfield, Linser, and
9 Parker the documentation establishing the fees they incurred as a result of the four factual
10 misstatements identified above. As for the attorneys’ fees against Dow, Defendants
11 should offer documentation identifying the fees incurred as a result of each instance of
12 his sanctionable conduct.

13 In the event the parties cannot reach an agreement, Defendants will be required to
14 file a motion setting forth the precise amount of sanctions they seek. That motion should
15 separately identify the sanctions sought against Cornfield, Linser, Parker, and Dow under
16 Rule 11 as well as the sanctions sought against Dow under § 1927. The motion must be
17 accompanied by all appropriate documentation linking the fees incurred to discrete
18 instances of sanctionable conduct. *See* Local Rule 54.2 (outlining requirements for fees
19 motion).

20 Accordingly,

21 **IT IS ORDERED** the Motion to Dismiss (Doc. 32) is **GRANTED**. The Clerk of
22 Court is directed to enter a judgment of dismissal with prejudice.

23 **IT IS FURTHER ORDERED** the Motion for Sanctions (Doc. 39) is **GRANTED**
24 **IN PART**.

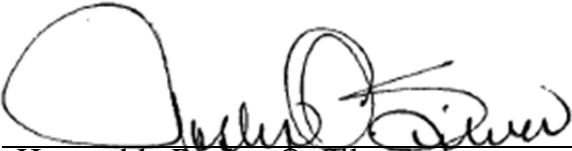
25 **IT IS FURTHER ORDERED** the parties shall confer regarding the amount of
26 sanctions within seven days of this order.

27 **IT IS FURTHER ORDERED** no later than **August 11, 2017**, the parties shall
28 either file a joint statement that they have reached an agreement regarding the appropriate

1 form of sanctions or, if necessary, Defendants shall file a motion for attorneys' fees as
2 outlined above. The response and reply shall be filed as required by Local Rule 54.2.

3 Dated this 24th day of July, 2017.

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Honorable Roslyn O. Silver
Senior United States District Judge